

THE *Old Government*

Old English Constitution,

In Relation to the

Hereditary Succession

OF THE

CROWN,

Antecedent to the

Revolution in 1688.

LONDON, Printed in the Year, 1714.

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NO Man hath a more profound respect for the publick Sanctions of my Country than my self. I know well they contain the collective Wisdom of the Nation, and are in a great measure the Ramparts of the common Propriety. But at the same time it is to be remembred, that God, Nature, and the immutable Customs of this Realm have plac'd some Things above their Influence and Coercion. And we know that the Judges of the Common-Law have in all Ages made bold sometimes to weigh the Statute-Laws in the Ballance, and for certain Reasons have now and then adjudged them null and void. Of which I shall in their proper place produce some instances.

I. But in the first place I shall lay this down for a Ground: That the Succession to the Crown of *England* by the Laws of God and Nature is inseparably annexed to proximity of Blood; and that all Statute-Laws contrariant to the Laws of God and Nature are *ipso facto* null and void.

That the Succession by the Laws of God is inseparably annexed to Proximity of Blood, appears plainly by that Statute-Law pronounced *Num. 27.* by the Mouth of God, where he by immediate Direction orders the descent of Honours and Possessions to be conferr'd by Birthright and Propinquity of Blood, and not by the Election or Discretion of the Supreme Magistrate, or the Community of the People, apart, or conjunctively.

The Prerogative of Primogeniture in point of
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Dignity

Dignity and Possession is of the same Divine Institution, as appears in several places of the Holy Scripture, *Gen. 4. 7.* God said to Cain of his younger Brother Abel, *His desires shall be subject to thee, and thou shalt rule over him.* Again, *Deut. 21.* where he forbids the Father to disinherit the First-born of his double Portion; because by Right Birth it is due to him. And lastly, *Exod. 13* where he maketh choice of the First-born to be consecrated to himself.

Agreeable to these are the Suffrages of the Fathers and Doctors of the Civil and Imperial Law. *St. Jerom in Epist. ad Onagr. and in Gen. 49.* saith, *That a Kingdom is due to the First-born.* *St. Chrysostom Hom. 5. advers. Judæos,* *The First-born is to be esteemed more honourable than the rest.* *Bodin de Repub. l. 6.* tells us, that it is not enough that a Kingdom descend in Succession, but that it descend also upon the eldest Issue Male, where he is next of Blood: *Scilicet enim ordo Naturæ, &c.* For so, saith he, not only the Law of God and Nature, but of all Nations doth require. And *Baldus* the famous Civilian saith, *hæc D. de Just. & Jure; semper fuit, & semper erit, &c.* It ever hath been, and always shall be, that the First-born and next of Blood succeed in the Kingdom. Wherein he is followed with the full consent of the most unexceptionable Interpreters both of Civil and Canon Law, as *Panormitanus, C. licet de voto. Corsetta Tract. de Pot. & Excell. Reg. Alciat, in l. obvenire D. de verb. sig.* and many others.

What hath been said here of Primogeniture in Point of Succession to the Crown, is likewise said with equal consequence of Proximity of Blood. For by the Civil Law, if a King have Five Sons, and the First-born dye before the Succession fall, or if he being possess'd of the Kingdom dye with

out Heirs of his Body, his Right of Primogeniture devolves to the next of Blood. In this *Albericus* is very exprefs, in *Proem. D. Sect. Discipuli*, & in *l. Donat. c. de Don. inter Vir. & Ux.* And *Baldus* in *L. 2. c. de Jure Emph.* faith, that Succession hath Reference to the time of Death, and respecteth the Priority that is then extant.

Herein the Common Law of this Nation agrees with the Civil Law. And therefore the Second Son of the King of *England*, after the Death of the First-born, is eldest Son within the Statute of 25. *Ed. 3.* where it is enacted, that it shall be High Treason to compass the Death of the King's Eldest Son and Heir, &c. So if the First Son dye in the Life time of the King his Father, the Second Son forthwith becomes *Primogenitus*, or *First-born*, within the Charter of King *Edward 3.* for the Dutchy of *Cornwall*, as it was resolved in the Case of Prince *Charles*, upon the Death of his Elder Brother Prince *Henry*. By which it appears, that Proximity of Blood is enabled with all the Prerogatives of Primogeniture.

But leaving this Point to the Church-men and Civilians, we will derive our Proofs from the Authority of the Common and Statute Laws of *England*, from Records of Parliament, and our own Histories, to make it clear that the Succession to the Crown of *England* is inseparably annexed to Proximity of Blood.

First, then it is plain, that all human Acts and Powers in the World cannot hinder the Descent of the Crown, upon the next Heir of the Blood; (tho' they may by Violence and Hostilities hinder Possession) because it is a Dowry which the King of Kings hath reserved to his own immediate Donation, and hath plac'd above the reach

reach of a mortal Arm: More of which afterwards. But as a Proof of this, by the Law of this Nation in the very moment of the Descent, the Person on whom it descends becomes compleat and absolute King. And so it was expressly resolv'd by all the *Judges of England*, 1°. *Jacobi*, *Watson* and *Clark's* Case cited in *Coke's 7. Rep. 10. v. 11. Calvin's Case*. And the same Person being thus compleat and absolute King by the said Descent; I farther add, that the Ligeance and Fidelity of the Subject is due to that Person by the immutable Law of Nature. And so it was solemnly adjudged by the Lord Chancellor, and all the Judges of *England*, in the Exchequer Chamber in the great Case of *Calvin*, 6 *Jacobi*, *Coke's 7. Rep. 12. v. 13. a. &c.* and 25. a. with which concurs that great *Amanuensis* of Nature, *Aristotle* in his *Ethic. ad Nicom.* By the Law of Nature the Father hath the Rule over his Children, and the King over his Subjects. And that great Philosopher *Seneca*, *de Cement. l. 1. c. 19.* to the same purpose says, *Natura commenta est Regem.* Nature did first find out a King. And for this reason, our Statute Laws do so frequently stile the King, our Natural Liege Lord, and the People Natural Liege Subjects, and their Ligeance to the Crown, Natural Obedience. This more plainly appears in Indictments of Treason; as in that of the Lord *Dacre*, upon the Northern Rebellion, 26. *H. 8.* where it is said, that the said Lord *Dacre*, not regarding the Faith, which he did Naturally and of Right owe to the King, &c. And Cardinal *Pool* was indicted, 30. *H. 8.* for committing Treason against the Lord the King, his Supreme and Natural Lord. And the constant Forms of Indictments run the same.

Secondly, It is the very Footstep of a Law founded in Nature, that a King displac'd is never in a

State

State of Rest, till it be reduced to its Native Centre. For tho' human Laws may be worn out by Desuetude or tacit Consent, yet the Institutions of Nature will never be abolish'd by the longest Tracts of time, but will retain their natural Inclination of returning; and of this kind is the Law of Succession to the Crown by the right Heir. For we find in the Stories of all Nations, that during Usurpations, tho' countenanc'd by publick Establishments, those States where they have happened, have continued under Convulsion, like a magnetick Needle, which never ceases trembling, till it hath found out it's beloved North Pole. I shall extract some few Instances of this out of our own Memoirs; and for brevity's sake ascend no higher than the *Norman* Conquest. And these shall be of Usurpations upon the Crown, countenanc'd by the publick Sanctions of this State.

The Second *William* and First *Henry* usurp'd the Crown, and this Realm remain'd under continual Inquietude and Commotion, till the Death of *Robert* their Elder Brother, and his Son *William* without Issue, by which the Right of the Crown centred in the said *Henry*.

The Usurpation of *Stephen* upon *Maud* the Empress, Daughter and Heir of the said *Henry*, was attended with Tragical Convulsions of this Nation, which never ceased till the Restauration of the right Heir *Henry* II. Son of *Maud*, in which *Henry*, the *Saxon* Blood was likewise restor'd, his Grandmother being next Heir of the Blood to *Edgar Atheling*.

Upon the Disinheriton of the House of *York* by that of *Lancaster*, this State felt unparallel'd Shocks and Disorders. There were fought in this Island during this Storm 17 pitch'd Battles, and no less than

than 8 Kings and Princes of the Blood, 40 Dukes, Marquesses and Earls, besides Barons and Gentlemen, and 200000 of the common People destroy'd. And this Usurpation continued 60 Years, yet the Body politick enjoy'd little Ease, till it had purged out the Usurpers.

The Usurpation of *Richard III.* determined in his Death, and the Introduction of the right Heir some time after.

That of *Jane Grey* of the House of *Suffolk* was but an Offer of Usurpation, being a Quotidian Ague that lasted but nine Days, and ended upon the Restitution of Queen *Mary*.

Lastly, It is matter of fresh and bleeding Experience, what Agonies the English Nation sustain'd after that fatal and impious Stroke given to King *Charles I.* of ever glorious Memory. Nature is wanting in adequate Metaphors, to express so great a Calamity. This State was like the Demoniack in the Gospel; and there was no Intermiſſion till the evil Spirit was dispossess'd, and King *Charles II.* restor'd to that Crown, which God, Nature, and the immutable Customs of this Nation had given him.

From these Instances it evidently appears, that the Succession of the Crown to the next of Blood is a Law Eternal, written by the immediate hand of God and Nature. And tho' Nature may for some time be repell'd by human Violence, yet it will sooner or later return with greater Vigour. And where-ever this Rule of Nature hath been impeached and violated, that hath evermore been done by the immediate and most visible Act and Finger of the Divinity it self, who is King of Kings, by whom they Reign, and that giveth the Kingdoms of Men to whom he will, as the Scripture

tells

tells us : And who being the Creator of Nature, can alone, when it pleaseth him, controul her Methods and Operations, as appears by the Interruptions of the Successions of *David, Solomon, Jehu*, &c. 1 *Sam.* 16. 1. and 2 *Kings* 9. 4. But they, that from Instances of this kind imagin they may maintain the Lawfulness of impeaching the Succession in the true Line, may as well infer, that they may lawfully rob and spoil their Neighbours, because God commanded the *Israelites* to spoil the *Egyptians*, *Exod.* 11. 2. and 12. 35. In those Cases we are bound to the Law, but not to the Example.

I come now to the Records of Parliament, which shall be three in Number.

First, that of the 39 *Henry VI.* wherein the daring *Richard Plantaginet* Duke of *York* by his Council exhibited to the Lords in full Parliament a Writing, containing his Right and Claim to the Crowns of *England* and *France*. Against which Claim it was objected on the King's Part, that the same Crowns had been entailed by Act of Parliament upon the King's Grandfather King *Henry IV.* and the Heirs of his Body, from whence the same King *Henry VI.* did lineally descend. The which Act (say the King's Friends there) is of Authoritee to defeat any mannere Title made to any Person, (for so are the Words.) To which Objection the said Duke of *York* answereth, (I shall cite the Words of the Record, as they are enter'd in the old English) That if King *Henry IV.* might have obteigned and rejoyssed the Seyd Corones of *England* and *Fraunce* by Title of Enheritaunce, Descent, or Succession, he neither needed nor would have desired, or made them to be granted to him, in such wise as they be by the Seyd Act; the which taketh noo Place, neither is of any force or effect against him, that is right Enheritor of the Seyd Corones; as it

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accordeth

accordeth with God's Laws, and all natural Laws, (saith the Roll.) And this Answer of the Duke of York to the King's Title, is afterwards by express Act of the same Parliament declar'd and recogniz'd to be good, true, just, lawful and suffisaunt, as it is there worded. And at the same time for preventing the Effusion of Blood, an Accord by the free Consent of the said Duke is establish'd, that King Henry VI. shall during his Life enjoy the Crown, and that from thenceforth the Duke of York shall be reputed Heir apparent to the Crown. Rot. Parl. 39 H. VI. num. 10. 13. 15. 27.

The next Record is that of 1 Ed. IV. in which that Parliament hath in a long Pedigree disclosed the Title of King Edward to the Crown, adding these Words; *knowing also certainly without doubt and ambiguity, that by God's Law and the Law of Nature, he (i. e. K. Ed. IV.) and none other, is and ought to be true, rightwys, and natural Liege and Sovereign Lord. And that he was in Right from the Death of the seyd noble and famous Prince his Father, very just King of the same Realm of England; Rot. Parl. 1 E. 4. num. 8. &c. & 9. Ed. 4. 10. a. Bagot's Assise.*

So that here it is expressly declared by two Parliaments of different Complexion and Interest, that the Succession of the Crown of England is inseparably annexed to Proximity of Blood by the Law of God and Nature.

The last Record is the Statute of Recognition made in the 1st year of K. James I. by the whole Parliament, in which among other things, *they in most humble manner beseech his Majesty, that as Memorial to all Posterity, it might be publickly declared and enacted in the High Court of Parliament, that the being bound thereunto by the Laws of God and Man, with unspeakable Joy recognize and acknowledge, the*

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immediately upon the Decease of Queen Elizabeth, the Imperial Crown of England, &c. did by inherent Right, and lawful and undoubted Succession, descend and come to his most excellent Majesty, as being lineally, justly, and lawfully next and sole Heir of the Blood Royal of this Realm. And that by the Goodness of God Almighty, and lawful Right of Descent, his Majesty was King of England, &c. And to this Recognition we do (say they) most humbly and faithfully submit, and oblige our selves and Posterities for ever, until the last Drop of our Blood be spent.

And all the Judges of England, some time after in the great Case of Calvin in the Exchequer Chamber do resolve, That King James's Title to the Crown was founded upon the Law of Nature, viz. by inherent Birthright and Descent from the Blood Royal of this Realm. So that this Parliament doth not in the least pretend to give any Title to King James or his Posterity, by their own Act and Establishment, but on the contrary doth expressly recognize, that the same King's Right and Title to the Crown doth accrue to him by the Laws of God and Nature, as the said Judges do declare. By all which it most manifestly appears, that in the Opinion of the three several Parliaments, the Succession of the Crown is united to Proximity of Blood by the Laws Divine, Natural and Human; which triple Sanction is not easily broken; together with the Resolution of all the Judges of England in the Point, which (as our Law Books tells us) in matters of Law is of the most sacred Authority, next to the Court of Parliament.

The next thing I am to prove is, that Statute Laws contrariant to the Laws of God and Nature, are *ipso facto* null and void. And here first I shall observe, that by a profound Policy of our Law the

sole Power of expounding Statute Laws, relating either to Church or State, is intrusted and lodged in the Judges of the Common Law, as King Charles I. hath noted in his Speech to both Houses upon passing the Bills 3^o of his Reign. See *Poulton's Statutes 3 Car. 1.* And as the Authorities of the Law are very clear, so the Judges have exerted this constructive Power in expounding Statute Laws sometimes even null and void, for certain Reasons to them appearing. See *Coke's 1. Inst. 344. a.*

As sometimes for Repugnancy: And therefore where the Statute of *Carlisle* enacted, that the common Seal of the *Cistercian* and *Augustine* Monks should be in the Custody of the Abbot, and four others of the Convents; and that any Deed sealed with the same Seal, not so kept, should be of no effect; this Statute was adjudged void for Repugnancy, because the Seal being in the Custody of the four, the Abbots could not seal with it; and when it was in the Hands of the Abbot, it was out of the Custody of the four. And so by this Statute these two Orders could make no Deed valid in Law. See 27. *Hen. 6. Finch Title Annuity 41.*

Sometimes for Absurdity, as where the Statute of *Ed. 6.* gives Chantries to the King, saving to the Donors and Founders all Services, &c. 1. *Ed. 6. c. 14.* This Act was adjudged void as to the Services. For it is absurd, and contrary to common Reason, (saith the Book) that the King should hold off, or do Service to his Subjects. 14. *Elif. Dyer. 3. 13. a. Mich. 16. & 17. Elif. &c. B. Strowd's Case* cited in *Coke's 8. Rep. 118. v.*

Lastly, the judges have expounded Statute Laws void in themselves, when they are contrary to God and Nature; and they are bound to adjudge them so, because the Laws of God and Nature being eternal

eternal and immutable, they cannot be alter'd by any human Authority, but only by the God of Nature who did ordain them. Therefore, if it should be enacted by Parliament, that no Man should honour the King, love his Parents or Children, or give Alms to the Poor, these Acts are void *ipso facto*, as contrary to the exprefs Divine Commands. *Dr. & Stud. l. i. c. 6. 21. Hen. 7. 2. v.*

So where a Man was made Judge in his own Cause by Act of Parliament, this Act hath been adjudged void; because (say our Books) it is contrary to the Law of Nature, that one and the same Person should be Judge and Party. *Coke's 8. Rep. a. & v. Dr. Bonham's Case, Hobart's Rep. 87. day. v. Savadge.* By the Statute of 2. Ed. 3. cap. 22. a Man attainted in a *Præmunire* is out of the King's Protection; by which Words any one might slay him, (as it is holden 28. H. 8. Title Crown Br. 197.) till the Statute 5. Elis. 1. yet the King may protect and pardon him; because the Protection of the Sovereign to the Subject is due by the Law of Nature. *Coke's 7. Rep. 14. a. Calvin's Case.*

The Statute 23. Hen. 6. cap. 8. and several others enact, that no Man shall be Sheriff of any County above one Year; and that any Patent of the King to any Person for a longer Term, tho' with an exprefs Clause of *non obstante*, shall be absolutely void, and the Pattentee for ever disabled to bear the Office. And yet it is resolved by all the Judges of England, that these Acts of Parliament are void; because such Act of Parliament cannot bar the King of the Service of the Subject, which the immutable Law of Nature doth give unto him. See 2 Hen. 7. 6. v. Calvin's Case, 14. a. in Coke's 7. Rep.

II. The Succession of the Crown to the next Heir of the Blood Royal, is a Fundamental and Primary

Primary Constitution of this Realm ; and indeed claim the Basis and Foundation of all our Laws. Sir Edward Coke, in his Preface to his fourth Report in the beginning, says, *That the Kingdom of England is they Monarchy Successive by inherent Birthright, of all other the most absolute and perfect Form of Government, including Interregnums, and with them infinite Inconveniences.* The Lord Chancellor Egerton in his Argument of the Case of the *Postnati* pag. 36. tells *That in Case of the Crown the Eldest, sole (or alone) to be prefer'd.* And this he reckons among the ancient Customs of this Nation, *against which, said he, there never hath been, nor ought to be any Dispute.* And indeed, if Parliaments may alter so Essential and Fundamental a Constitution, the Monarchy of England, which hath been Hereditary by Law will become Elective, and disposab[e] at the Arbitrary and Will of the People. And by the same Rule that they may exclude the next Heir, they may the next to that, and so by consequence the whole Line. But tho' the Common-Law of England doth allow the Parliament to repair and mend the Building, yet it doth not allow them to pull down and subvert the Foundation of it. And it may justly be suspected that such Electors may in time believe, that they have a Power to unmake what they can so easily make. And this was the reason that those Kings of England, who had submitted their Necks to this Popular or Statute Kingship were constrain'd to be always on their Guard, and to defend their wrongful Possessions by the Sword as well against their Electors, as the Right Heirs as we shall hereafter shew. And this Alteration of the Monarchy in so Fundamental a part thereof from Inheritance to Election, may prove equally mischievous also to a King in Possession, tho' he claim

declaim too by Inherent and Undoubted Birth-right ;
 For the same Reason, which the People may think
 sufficient to exclude the Right Heir, may, when
 as they please, be deem'd valid enough also to depose
 and eject the Possessor of the Crown, be his Title
 lawful or not ; which is a dangerous Consequence,
 and for which the Supreme Governor is not oblig'd
 to these new Scheme-mongers, who by limiting
 Obedience to Possession only, first destroy all no-
 tion of Right and Wrong, and in the next place
 make the Enjoyment of a Crown so precarious
 and insecure, that no Man in his Wits would ven-
 ture to wear it.

III. The Succession of the Crown to the next
 Heir of the Blood is one of the highest, most essen-
 tial, and undivided Rights of the Crown, and a
 Pearl of the most transparent Oriency and Magni-
 tude in the Imperial Diadem of *England*. And the
 Kings of *England* themselves, their Chancellors,
 Treasurers, and all great Officers of State, their
 Privy Counsellors and the Judges (who are only
 to expound all Statutes by which this Right of Suc-
 cession may be violated) are all by Provision of
 the Law solemnly Sworn upon the Holy Evange-
 lists to maintain and defend the Rights of the
 Crown, and that they suffer no Disinheritance or
 Damage to accrue thereto. 18. Ed. 3. *The Oath of*
the Judges in Poulton. And every Member of the
 Common's House by the §. *Elis. c. 1.* is oblig'd be-
 fore he enter, or have voice in the said House, to
 Swear that he will to his Power defend all Juris-
 dictions, Privileges, &c. annexed to the Imperial
 Crown of this Realm ; and if he do not he shall
 be no Member, and further punished. And the
 Oath to be taken at Court Leets all over the King-
 dom by every Subject above Twelve Years old, is,
 That

That he will be true and faithful to the Sovereign and his Heirs, &c. *Cok. 7. Rep. 6. v. Calvin's Case* So And it is remarkable, that in the Parliament of 4 *Histor* Ed. 3. the Lords and Commons being demanded herefo their Advice by the King, in a Matter relating and th the Crown, did answer unanimously, that the Ri would not assent to any thing in Parliament that the tended to the Disinheriton of the King and his Ele Heirs, or the Crown, whereunto they were Sworn *earn* *Rot. Parl. 42. Ed. 3. Num. 7.* And Sir Ed. Coke com *becam* menting upon that Record saith, *that it is a Law II. and Custom of Parliament, that no King can alien the Rich Crown from the right Heir, tho' by consent of the Lords you and Commons. 4. Inst. 14. in Margine.* And in ano Com ther Place he saith, *that King John's resignation of the Ch Crown to the Pope was utterly void; because the Royal tell Dignity is an inseparable Inherent to the Royal Blood of fine the King, descendable to the next of Blood of the King, succ and cannot be transferr'd to another. 12. Rep. 28.* by And which is much more in 1. *Jac. c. 1.* there is a rati Recognition of the Parliament, that the Crown *Sau* of England is lawfully descended unto K. James, *was* his Progeny and Posterity. *the*

To leave no room for starting new Principles I shall answer some few Objections and so conclude.

1. There are several Instances of Kings of this Nation, whose Titles to the Crown depended purely upon the Election of the People, and Acts of Parliament, and not upon Proximity of Blood, and Inherent Birthright; as K. John, Henry IV. Henry VII. And Henry VIII. entailing the Crown upon himself and Children by Act of Parliament.

I answer, that these Titles were never look'd upon as good, or Barrs against the right Heirs.

First, as for K. John, it is plain he was King *de facto*, but not *de jure*, for he invaded the Crown against

against the Right of his Nephew *Arthur*, who was
 Son of *Geoffry*, *John's* Eldest Brother, as all the
 histories of that time do observe and lament. And
 therefore wanting that Title which God, Nature,
 and the immutable Customs of this Realm give to
 the Right Heir, he was constrain'd to pray in Aid
 of the People, and to patch up a Title from them
 by Election. The Story is thus in *Matthew Paris* a
 learned Monk, who lived in that time, and who
 became afterwards Chronologer Royal to King
Henry II. "*John* upon the Death of his Brother King
Richard I. was advanced to the Throne by the Fa-
 vour of the great Ministers of State, and at his
 Coronation *Hubert* Archbishop of *Canterbury* and
 Chancellor of *England* (a Man of great Subtilty)
 tells the Nobility, Clergy and Populace in a very
 fine Harangue, that no Man whatsoever was to
 succeed in this Kingdom, unless he were elected
 by the Universality of the People, with Consider-
 ation had of his Virtues, after the Example of
Saul's Election: And then he added, that *John*
 was a qualified Person in that kind, and therefore
 they ought to choose him for their King. But
 Archbishop *Hubert* being afterwards demanded
 how he durst in such an Assembly affirm, that the
 Monarchy was elective, he reply'd, that he had
 it by Revelation and Prophecy, that *John* would
 some time or other endanger the Realm; and
 that he might curb him, he did pronounce him
 admitted to the Crown by Election, and not by
 Hereditary Succession. So that this was done
 only by way of Umbrage and Hypocrisy, to serve
 a turn. And truly, the good People did accord-
 ingly some time after check this unfortunate King,
 and bring him to a low Condition, choosing the
 French King's Son their King. So that K. *John's*

Tenure was good no longer than he could maintain it with his Sword, which is the Case of Thieves and Pyrates.

Secondly, For K. Henry IV. he was likewise a *facto* King only; for he laid violent Hands upon the Crown, by the treasonable and barbarous Deposition and Murder of his natural Lord and Sovereign K. Richard II. after whose Death, without Issue, the Legal Title remained in the House of Clarence, which was the Elder Line; and so K. H. I. was forc'd to truckle under an Election of the People, and their Establishment in Parliament, which Establishment was *ipso facto* void in Law against the House of York, (which married after with the House of Clarence) see Rot. Parl. 29. H. 6. num. 13. 15. 27. And truly this King considering how much a Title to the Crown by common Law and inherent Birthright exceeded a Title by Statute and the People's Suffrage, made his solemn Claim to the Crown in Parliament by Descent from K. H. III. which, tho' it was a notorious Figment, looked upon to be a better Security than popular Establishment. See Rot. Parl. 1 H. IV. Memb. 20.

Thirdly, For King Henry VII. he was also King *de facto*, the Title abiding in Elisabeth the Eldest Daughter of Edward IV.

King Henry VII. laid claim to the Crown, ascending in a right line from John Duke of Somerset Eldest Son to John of Gaunt Duke of Lancaster, his Third Wife Katharine Swinford; by which Katharine the same John of Gaunt had Issue the said Duke of Somerset and other Children, before Marriage with her, and during his Marriage with his Second Wife the Lady Constance, Daughter and Heir to the King of Castile. So that these Children were Heirs by our Law, and consequently incapable

inheritance

inheriting. After the Death of his Second Wife, *John of Gaunt* for the passionate Affection he bare to his Children by *Katharine*, married her, and procured them to be legitimated by Act of Parliament, and made inheritable to all Preheminencies, Honours, Dignities &c. excepting the Regal Dignity. *Rot. Parl. 20. R. 2. n. 29. Rot. Parl. 20. R. 1. 2. Pars secunda Memb. 6. Rot. Parl. 8. H. 4. Pars prima memb. 14.* Besides *Margaret* Countess of *Richmond* and *Derby*, the Mother of King *Henry VII.* and thro' whom he must necessarily derive whatever Title he could pretend to, died after him in 1. *H. VIII.* And therefore this Prince having so many Flaws in his Title, and knowing that the Laws divine, natural and human were against him, it's no wonder he so much courted the People, and was so sollicitous for an Establishment by them; for it is plain he laid no great Stress upon his own Title: Nor did he rely much upon his Statute Title, as appears by Two Acts of Parliament.

I. By that very Statute Law by which the Crown was established upon him; for as my Lord *Bacon Hist. 11. 12.* hath observ'd, he did not press to have that Act penn'd by way of Declaration or Recognition of Right, or to have it by any new Law, but chose rather a Sort of middle way, by way of Establishment, and that under covert and indifferent words, viz. *That the Inheritance of the Crown should rest, remain and abide in the King, &c.* Which Words might equally be applyed, that the Crown should continue to him, but whether as having Right to it, (which was doubtful) or having it then in Fact and Possession, was left fair to Interpretation every way.

II. From the 11 *H. VII. c. 1.* which he procur'd to be made in the 11th. of his Reign, in which it

was enacted, that no Person that shall serve the King for the time being (for so are the very Words) in his War shall be attainted or impeach'd in his Person or Estate what Fortune soever fall by chance of Battle against the Mind and Will of the same King for the time being.

The Lord Chancellor Bacon in his *Hist. of H. VI.* fol. 144. comments very handsomely upon this Act of Parliament: This Law, saith he, had in it Part of prudent and deep Fore-sight, for it took away occasion for the People to busie themselves in pressing into the King's Title to the Crown; for howsoever that fell out to be good or bad, the People's Safety was provided for. And the same Author in the close of this King's Life, *ibid.* fol. 233. & 211 reckons his opportune and seasonable Death among his greatest Felicities, which withdrew him from any future Blow of Fortune; and which (continued he) in regard of the Title of his Son, being then 18 years of Age, and a forward Prince, had not been impossible to come upon him: Because upon the Decease of King Henry's Queen, in whom the true Title lodged, and who died some years before the Crown immediately by the Law of England descended upon Prince Henry; for there can be no Tenancy by the Courtesy of the Crown. So that in the Opinion of this Lord Chancellor also, the King's Title by Statute was of small account, in Respect of that of his Son by Common Law. By all which it plainly appears, that this King had no legal or inherent Right of his own to the Crown and therefore contrary to his own Inclination, he was constrain'd to stoop to an Establishment of the People, which notwithstanding was null in Law.

For King Henry VIII. tho' he was undoubtedly King *de jure*, yet there happened in this Prince's Case certain odd Circumstances, which necessita-

ted him, contrary to his better Knowledge, to allow his People a share in ordering the Succession of the Crown. And therefore by the Statute 25. *H. 8. c. 22.* he confirms his Divorce from *Katharine*, and bastardizeth *Mary* her Daughter; and on the other Hand corroborates his Marriage with *Ann*, and legitimates *Elizabeth* her Daughter, and makes her inheritable to the Crown. The Legitimation or Bastardy of these two Daughters depending much upon the Validity or Weakness of the Papal Dispensation in the first Marriage; and this being a perplex'd Question in those Days, he hoped to have cut this Gordian Knot with the Sword, and pretended Omnipotency of a Parliament. And then after he had done this, he forthwith marries *Jane Seymour*, and by the Statute 28. *Henry VIII. c. 7.* attaints his Wife *Ann*, and bastardizeth *Elizabeth* her Daughter; and breaking down the Boundaries of all Law and Common Reason, he procures it to be enacted, *That in Case he had no Issue by Jane, he might dispose of the Crown to whatsoever Person he did in his own Discretion think fit.* And the whole Nation was oblig'd by the Sanctimony of an Oath to the Defence of this Law. This he did that he might advance to the Throne his natural Son *Henry Fitz-Roy Duke of Richmond*, (who died soon after) whom he loved most passionately, and so to exclude for ever his Sister *Margaret of Scotland*, and all her Descendants. See *Heylin's Ecclesia restaurata, fol. 6.* Then by the Statute of 35. *Henry VIII. c. 1.* he entails the Crown upon himself, Prince *Edward*, and the said *Mary* and *Elizabeth*; and in case they happened to have no Issue, he was again impowered by the same Act of Parliament, to dispose of the Crown to whatsoever Person or Persons he pleased by his last Will and Testament: And the whole Nation was likewise Sworn to the maintenance of this Law. And by virtue of this extravagant Power, in case his Children died without Issue, as afterwards they did, he bequeathed the Crown to the House of *Suffolk*, being the younger House, and in defiance of all Laws and Brotherly Affection disinherited, and totally excluded the elder House of *Scotland*. These Niceties and Designs consider'd, it's plain *K. Henry* was constrain'd to pray in Aid of the People to give some Colour to all these Contradictions and Inconsistencies. And therefore I conceive, that no Man of common Reason will draw Arguments from the Statutes abovemention'd to prove that the Parliament of *England* could by them exclude the next Heir of the Blood.

By the whole Matter of this first Objection it appears, that the Princes, which submitted to these tumultuous and Statute-

Statute-Kingships, did it, either because they invaded and usurped the Crown, contrary to the Laws Divine, Natural and Human, or to give a Colour to their own private Designs. And yet after all these popular Establishments, fenced with the Sanctions of Oaths, they could not transfer the Right from the next Heir of the Blood; that being God's immediate Donation. For tho' an Act of Parliament shall command me to say, that an *Ethiopian* is white, and that under the highest Oaths and Penalties; or that an Ape is a Man; yet notwithstanding the *Ethiopian* can never in truth change his Skin, or Complexion, nor the Ape his Species and commence a Creature rational.

II. Some may, by way of Objection, ask, why may not the Crown be transferr'd from the next Heir of the Blood by Parliament, as well as all other Inheritances, and Possessions in the Kingdom may from the Right Heir of the Subject?

In answer to this, I say there is no similitude between the Cases. For, first, Private Men derive their Inheritances from their Ancestors; but the next Heir of the Blood Royal derives not the Crown from his Predecessors, nor from the People, but immediately from God; as I have prov'd already in the beginning of this Argument. And no Person, or Community can give away or transfer a thing, which they never had vested in them, either in Possession, or in Right.

Secondly, The Law of the Crown (which is a principal part of the common Law of *England*) differs from the Law of the Subject in Point of Descents; and therefore that may be Law in case of the Crown, which is not in case of the Subject; *Cok. 1. Inst. 11. v. § 344. a. 1.* of which I shall here give some Instances.

A Private Man being an Alien born cannot by our Law inherit Land here; but the Crown shall descend upon the next Heir of the Blood, though an Alien, as in the Case of *Henry II.* who was born an Alien, and begot by an Alien: As likewise in the Case of *K. James I.*

If a King of *England* have three Daughters, and Dye, the Crown shall descend upon the eldest alone; but in Case of a Subject the Inheritance shall go to all three Daughters. *Cok. 1. Inst. 165. a. 25. H. 8. c. 22.*

If a Subject marry an Heiress, and have Issue by her, a Son, and the Wife dye, the Husband shall enjoy the Wife's Lands during his Life; but if a Man marry a Queen Regnant of *England*, and hath by her a Son or a Daughter, and then she dyes, the Crown descend immediately upon the Issue,

tho'

tho' the Father be alive. *Ellesmere's Postnati* 36. Lord Bacon's *H. 7. fol. 4. 121. 217. 231.*

So the half Blood is no Impediment to the descent of the Lands of the Crown, as it happened in the Cases of *Edward VI.* and the two Queens, *Mary* and *Elizabeth*; and yet in the Cases of Subjects it is clearly otherwise. *Plowd. Com. 245. a. Co. 7. Rep. 12. v. Postnati. Co. Inst. 15. v.*

So likewise if the right Heir of the Blood, or the Father or Mother of the right Heir from whom the Crown descends, are attainted of High Treason by Parliament, these Attainders are no obstructions to the descent of the Crown, as it happened in the Cases of our K. *Ed. IV.* and his Father, who were both attainted, as also in the Case of K. *James I.* whose Mother was attainted of High Treason, and Executed, and yet the Judges and Commissioners that gave Sentence upon her set forth a publick Declaration, that the attainder of the Mother did not derogate from the Right of her Son to the Crown of *England.* *Cambd. vit. Elis. Reg. 28. 1586.* But all Men know 'tis otherwise in the Case of Subjects, whose Descents are obstructed by the attainders of their Ancestors. By these few Instances it appears, that though an Inheritance may thus be given away from a Subject, yet it doth not in any wise follow, that the Crown may be disposed from the next Heir.

III. The third and last Objection is founded upon the Statute of 13°. *Elis. cap. 1.* wherein it is enacted, *that if any Person shall affirm, that the Parliament of England hath not full Power to bind and govern the Crown in Point of Succession and Descent, that such Person (during the Queen's Life) shall be guilty of High Treason, and after her Death shall forfeit his Goods and Chattels, &c.*

In answer to this it is to be observ'd, First, that this Law was made in the time of a Queen, whose Title to the Crown depended upon Statute Law, as appears by the very Act recognizing her Title to the Crown; 1 *Elis. cap. 3.* And this Act 13° was made in affirmance and vindication of such Title to the Crown by Statute, as is plain from the Body of the same Act; and therefore this Queen had little Reason to scruple the passing a Bill of this Nature. But I much doubt, whether a Common Law-Prince, who owes his Title only to God, Nature, and the immutable Customs of the Nation, unless under like Circumstances with K. *Henry VIII.* would have assented to an Act so derogatory to the Regalities, by reason of the manifest Inconveniencies that might ensue to himself and Posterity by such Assent and Condescension.

Secondly, Sir *Edward Coke*, 1. *Inst. 43. a. 4. Inst. 52.* admonishes

nishes us, that the true Scope and Design of our Statute Law are oftentimes unintelligible, without the help of the Chronicles and Memoirs of the Age, wherein they were made. Of which there cannot be a more pregnant Instance than this here. And therefore I will in Charity believe, that the Contrivers of this Objection did never rightly inform themselves of the History and true Reason of making this Statute, which in Truth was this, according to *Cambden's Vit. Elis.*

Some time before this Statute, *Mary Queen of Scots* Dowager of *France* and Mother of our *K. James I.* being defeated in Battle by her rebellious Subjects of *Scotland*, fled into the Bosom of her Kinswoman *Elizabeth of England* for Protection: who inheriting her Father's Aversion to the House of *Scotland*, contrary to the Royal Sympathies, which one Sovereign ought to have for another in Distress, and indeed against the Rules of Common Hospitality, commits *Mary* to a loathsome Prison. The Pope with some of the Catholick Princes and others of her Friends endeavour to set her at liberty, and to advance her to the Throne, that Age looking upon *Mary's* Title to be much Clearer than that of the Queen in Possession, she having been Bastardized, and was at best but a Statute Queen. But *Mary* derived by the common Law, and a direct true Line from *Margaret* the eldest Daughter of *K. Hen. VII.* and *Elizabeth* his Queen. Besides, in the Year this Statute was made, there was a Marriage proposed between *Q. Eliz.* and *Henry Duke of Anjou*, and no small care taken to establish the Succession upon the Issue proceeding from the same Marriage. And there is a remarkable Clause in the same Statute of 13. viz. *That every Person, of what Degree or Nation soever, who shall during the Queen's Life Declare or Publish, that they have any Right to enjoy the Crown of England, during the Queen's Life, shall be disabled to enjoy the Crown in Succession after the Queen's Death.* Which Clause was most apparently contriv'd against the same *Mary* and her Son *King James*.

Thirdly, This Act of 13. being a Law made in diminution, or rather in open and hostile defiance of the Title of *Scotland* to this Crown, it was by tacit and implied consent of the Law, and the whole Nation, utterly abrogated upon the first moment of the Union of the Two Crowns in the Person of *K. James I.* or at least by the solemn and express Repeal, 4. *Jac. cap. 1.* of all hostile and unkind Laws between *England* and *Scotland*, of which I am sure this of 13. was none of the least.

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